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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

RICHARD TOUCHETTE

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Employer

Indexed as
Touchette v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Michael Fisher

For the Employer: Patrick Turcot

Heard at Lethbridge, Alberta,
May 14 and 15, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Richard Touchette ("the grievor") is a border services officer (BSO) with the Canada Border Services Agency (CBSA) stationed at the Coutts, Alberta, border crossing to the United States of America.

[2] On May 31, 2014, the grievor used disrespectful language in his dealings with a traveler. He does not deny having breached the CBSA's *Code of Conduct* in this respect. He received a two-day suspension, which he feels was excessive, given all the mitigating circumstances. This is the reason the grievor brought the matter forward for adjudication.

[3] The purpose of the hearing is not to review the employer's decision. This is a hearing *de novo*. The evidence, including admissions made by the grievor, clearly establishes a contravention of the Code of Conduct, but I find the numerous mitigating factors surrounding the contravention to greatly outweigh the only aggravating factor. For reasons which will follow, I find that a written reprimand is the appropriate measure, given the CBSA's commitment to a positive, progressive disciplinary regime.

II. Summary of the evidence

[4] Sunil Kapoor, a Canadian resident, had been living in the United States until July of 2013, when he decided to go to Calgary, Alberta, for family reasons. He remained a visitor in Canada until April of 2014, at which time Mr. Kapoor decided, again for family reasons, to permanently move back to Calgary.

[5] While living in the United States, Mr. Kapoor had purchased a vehicle for his daily use. He drove it to Calgary, Alberta in July of 2013 and drove it in Canada with his California licence plates still in place. He was informed that to properly register his vehicle in Alberta, he would be obliged to import it into Canada. Doing so involves an important procedural formality, which consists of driving back into the United States, turning around, and bringing the vehicle back.

[6] Mr. Kapoor did so on May 31, 2014. He crossed into the United States at the Coutts border crossing. He received the necessary title stamp from a United States customs agent and then he returned to Canada. He was instructed at the Canadian

border crossing to park his car and take his documents into the office for processing, which he did.

[7] Mr. Kapoor went to the grievor's workstation at the commercial counter. When the grievor heard of Mr. Kapoor's plan to permanently import his vehicle, he instructed Mr. Kapoor to complete the applicable form and return to the counter, which he did.

[8] Importing a vehicle normally requires paying taxes and duties. An exception is available to a returning resident, provided he or she meets certain conditions. To apply the exception, the grievor was obliged to determine, by way of a series of questions, whether the conditions had been met.

[9] Mr. Kapoor testified that the grievor looked at his form and then asked him a series of questions. Unfortunately, with the passage of time (as of the hearing, over five years had passed since the incident), Mr. Kapoor did not recall the exact questions posed by the grievor. Nor did he precisely recall the answers he provided.

[10] Equally unfortunate was the investigator's failure to inquire of Mr. Kapoor as to the grievor's exact questions and the answers that Mr. Kapoor provided. The very brief exchange between Mr. Kapoor and the grievor was the basis for the formal discipline which ultimately ensued.

[11] The grievor, on the other hand, recalled precisely what he asked of Mr. Kapoor. To apply the returning-resident exemption, the grievor had to learn when Mr. Kapoor moved back to Canada, so this is what he asked. The grievor testified that Mr. Kapoor's response was, "I live in Canada." Since that was not the information the grievor required, he asked Mr. Kapoor a second time about when he had moved back to Canada. Mr. Kapoor gave the same answer, "I live in Canada." The grievor asked the same question, worded slightly differently in case Mr. Kapoor did not understand what was being asked of him, and received the same answer, "I live in Canada."

[12] The grievor testified to asking this question four to six times and to receiving the same response every time. He testified to an increasing level of frustration with Mr. Kapoor and to a growing feeling that for reasons unknown, Mr. Kapoor was being less than forthcoming.

[13] A second BSO, Tyler Borg, corroborated the grievor's testimony in this regard. Mr. Borg was on duty with the grievor and was working right beside him when the

exchange took place. Mr. Borg had no interaction with Mr. Kapoor. Although Mr. Borg's memory was somewhat hazy on the precise details of the exchange, he testified to Mr. Kapoor giving the same answer over and over, which appeared to increase the grievor's level of frustration.

[14] Mr. Borg recalled that his internal investigation interview took place approximately two weeks after the events in question. When Mr. Borg was shown the notes of the interview, Mr. Borg recalled the internal investigator asking, "From your perspective, did Mr. Kapoor contribute to elevating/escalating the situation?" Mr. Borg recalled having answered as per the notes taken by the internal investigator:

> *Yeah. He was asked direct questions and he just wasn't answering the question. Like "When did you move to Canada". He said, "well, I came back to Canada at "this" time, but I wasn't just visiting … I'm not sure of his exact response. He was just giving the same answer.*

[15] In his testimony, Mr. Borg said that he felt that Mr. Kapoor was either being flippant in his responses or for some reason was not taking the process seriously.

[16] Mr. Kapoor, despite being unable to recall the questions and answers, did not feel he had been flippant, and he denied he had not taken the process seriously.

[17] Neither Mr. Borg, Mr. Kapoor, nor the grievor felt there was a language barrier.

[18] The grievor testified to his frustration finally getting the better of him, and he said to Mr. Kapoor words to the effect that, "Do you think I am an idiot?" and, "You do think I'm an idiot, don't you." He then uttered a phrase containing words to the effect that, "I am going to haul your ass back to the U.S."

[19] Mr. Borg knows the grievor very well, having worked beside him at the Coutts border crossing for approximately six years. Mr. Borg testified to being extremely surprised at the grievor's strong language. He characterized the grievor as being consistently very polite, patient, and professional with travelers. At no other time had Mr. Borg ever heard the grievor use such language.

[20] Mr. Kapoor, Mr. Borg, and the grievor all testified to the exchange between Mr. Kapoor and the grievor as taking place in normal speaking voices. Voices were not raised, and the words were not accompanied by any gestures or non-verbal threats. By every witness's account, though, including the grievor, the words were unprofessional in nature.

[21] The grievor was unable to learn from Mr. Kapoor the details of his return to Canada, so he instructed Mr. Kapoor to go to the cashier and pay the applicable taxes and duties. Mr. Kapoor paid $724.89, left the office, and drove back home to Calgary.

[22] Mr. Kapoor testified to feeling very upset over this exchange, but he was unaware of any potential recourse until he went to the CBSA's website a few days later and learned how to make a complaint online. On June 4, 2014, he filed one electronically.

[23] Kevin Hewson, Director, Southern Alberta and Southern Saskatchewan District of the CBSA, was made aware of Mr. Kapoor's complaint as per the normal course of the complaint process. He assigned Superintendent Steven Singer to commence what is known as the "enhanced complaint mechanism" or "ECM".

[24] Mr. Singer contacted Mr. Kapoor on June 9, 2014, and conducted a telephone interview. He learned the relevant details of Mr. Kapoor's personal circumstances and the details surrounding the permanent importation of his vehicle. Based on the information obtained by Mr. Singer, the CBSA ultimately determined that the "former resident" exception applied, and it reimbursed Mr. Kapoor the $724.89 he had paid on May 31, 2014.

[25] Mr. Singer then emailed the grievor and Mr. Borg, advising them of the complaint and of his desire to obtain a statement from them about what had happened.

[26] Again, it is unfortunate that Mr. Singer's email was not retained, because it forms a crucial part of the inquiry into aggravating and mitigating factors. In the email, Mr. Singer asked the grievor for a brief account of what took place and specifically requested that the grievor address two issues, namely, the discussion pertaining to the returning-resident exemption and the comment about "hauling [his] ass back to the U.S."

[27] The grievor's June 10, 2014, response to the email consisted of the following three paragraphs:

> ***Summary of Events:***
>
> *1. I asked Mr. Kapoor repeatedly when he had moved back to Canada. He answered me each time "I live in Canada." His tone*

> *suggested to me that I was a fool for asking him that question so many times. My reason for asking was to ascertain if he was eligible for a former resident exemption. That is why I asked if he thought I was an idiot.*
>
> *2. I never said "haul his ass to the U.S." I mentioned the car may be inadmissible and he may have to return it to the U.S.*
>
> *3. If he had claimed former resident status when he moved back to Canada, he would have qualified for the $10,000 exemption. I attempted to give him the benefit but his arrogance and unwillingness to listen made it difficult. When asked about a B4 when he moved back to Canada, he looked at me like I was a complete fool and answered "I live in Canada" From this lack of cooperation and understanding, I proceeded to complete the RIV and B15 for the import of the vehicle. I had tried my utmost to help this individual but he refused to listen.*
>
> *[Emphasis in the original]*

[28] The investigator ultimately assigned to this file, following Mr. Singer's initial efforts, was Doug Bakke. Mr. Bakke did not testify, but his reports were submitted in evidence, and Mr. Borg testified to providing the following narrative to Mr. Bakke on June 11, 2014:

> *… I did not hear the conversation between [the grievor] and Mr. Kapoor in its entirety. I can, however, say that it is my opinion that [the grievor] believed he was being deceived by Mr. Kapoor.*
>
> *I can say that "yes" [the grievor] did ask Mr. Kapoor if Mr. Kapoor thought he was an idiot. I believe he said, "do you take me for a fool?", to which the client responded, "No. Not at all".*
>
> *I did hear [the grievor] state, "I will haul your ass back to the US".*
>
> *I believe the client paid duty and tax on the vehicle, I am not sure if he was entitled to an exemption or not as I did not hear all of the particulars of Mr. Kapoor's story.*
>
> *I do not have any notes on this incident.*
>
> …

[29] By the time Mr. Bakke formally interviewed the grievor, the grievor testified to having had time to reconsider his comment, "haul [his] ass back to the U.S." The grievor did not recall using the phrase in exactly the way Mr. Kapoor suggested, because it did not make any sense to him. He did admit, though, that if others had reported hearing him say these words, he was not about to deny having uttered them.

[30] The formal interviews that Mr. Bakke conducted as part of the investigation do not provide much additional information, other than Mr. Borg's statement, which contained the following question and answer:

> …
>
> *Q: From your perspective, did Mr. Kapoor contribute to elevating/escalating the situation? If so, how?*
>
> *A: Yeah. He was asked direct questions and he just wasn't answering the question. Like, "When did you move to Canada". He said "well, I came back to Canada at "this" time, but I wasn't just visiting … I'm not sure of his exact response. He was just giving the same answer.*
>
> …

[31] Section 10 of the CBSA's *Code of Conduct*, under the heading "Contact with the Public", states, in part, as follows:

> *Our CBSA values of **Respect**, **Integrity** and **Professionalism** guide our interactions with members of the public. As CBSA employees we demonstrate these values in a number of ways, including:*
>
> …
>
> *· by never making … insulting, offensive … statements … to or about another person….*
>
> …

[32] In a disciplinary meeting held on August 22, 2014, the grievor admitted to the unprofessional conduct allegation and offered the following by way of mitigating factors:

- He regretted having made the statement and stated that he had made it out of frustration;
- He had a clean disciplinary record of over 22 years as a BSO;
- He had voluntarily done a remote posting assignment in Alert, N.W.T.;
- He had twice acted as a regional intelligence officer;
- He had twice acted as a superintendent;
- He is involved in mentoring new CBSA employees;
- He participates in team-building exercises for the unit, such as golf outings;
- He is active in the CBSA's Ceremonial Unit (its uniformed presence at funerals and Remembrance Day ceremonies), and
- He helped a local shooting range become certified and approved for use by BSOs who want to improve their shooting skills in preparation for their firearms qualification.

[33] With a clearly established code-of-conduct violation before him, Mr. Hewson was charged with the responsibility of weighing the aggravating and mitigating factors and

arriving at a suitable, just, and fair disciplinary measure. He did not make the decision on his own; rather, he sought advice and input from three other sources, which were the CBSA's Labour Relations unit, the investigator Mr. Bakke, and CBSA Corporate Services. From them, he received suggestions for a suitable disciplinary measure ranging from an oral reprimand to a five-day suspension.

[34] Mr. Hewson testified to weighing what he felt were the aggravating and mitigating factors before deciding upon the two-day suspension as the appropriate disciplinary measure. The disciplinary letter, addressed to the grievor and dated October 14, 2014, reads in part as follows:

> …
>
> *This letter is further to the administrative investigation with respect to an incident which transpired on May 31, 2014, at the Port of Coutts, Alberta. The investigation into this matter has been completed.*
>
> *The fact-finding process has determined that you had an interaction with a client at the front counter when he importing a vehicle into Canada. I conclude the allegation that on May 31, 2014, you violated the CBSA Code of Conduct, 10. Contact with the Public, by acting in an unprofessional manner when you made inappropriate comments towards a traveler.*
>
> *In determining the appropriate disciplinary measure, I have considered all relevant facts and all aggravating and mitigating factors, including, the fact you accepted responsibility for your actions and expressed genuine remorse; no previous discipline record; the nature of the comments and that Border Services Officers are expected to be professional at all times when dealing with the public.*
>
> *After consideration of all relevant facts, law, policy and the aggravating and mitigating factors, and in accordance with the authority delegated to me by section 12(1)(c) of the Financial Administration Act, I have determined the appropriate disciplinary measure is a* ***two (2) day suspension****.…*
>
> …
>
> *[Emphasis in the original]*
>
> *[Sic throughout]*

[35] Mr. Hewson testified to having considered several aggravating factors, including the nature of the remark itself. It was highly unprofessional and was made in a public setting.

[36] Mr. Hewson emphasized that one of the aggravating factors was the grievor's untruthfulness about remarking to Mr. Kapoor, "haul your ass back to the U.S." In his interview with Mr. Bakke on July 13, 2014, the grievor said, "I read the [complaint] after I responded to the email. I read it the other day & I didn't realize it was attached."

[37] Mr. Hewson was suspicious as to how the grievor would have known that he was alleged to have made this "haul … ass" remark if he had not, as he claimed, read Mr. Kapoor's complaint before responding to Mr. Singer on June 10, 2014. To Mr. Hewson, it was an indication that the grievor was less than forthcoming about the matter.

[38] In cross-examination, it became clear that Mr. Hewson was unaware of the content of Mr. Singer's email to the grievor in which he had instructed the grievor to prepare a narrative about the event and to pay particular attention to two points, namely, the exemption that might have applied to his situation, and the remark, "I will haul your ass back to the U.S." A copy of Mr. Kapoor's electronically submitted complaint was attached to Mr. Singer's email. The grievor testified to not realizing that there was an attachment and to simply responding to the questions Mr. Singer had posed in the body of his email of June 10, 2014.

[39] As indicated earlier, no copy of Mr. Singer's email to the grievor dated June 10, 2014, was available for admission into evidence.

III. Submissions

A. For the employer

[40] The employer argued the sanction was reasonable under all the circumstances and should not be altered. Two cases, *Mercer v. Deputy Head (Department of Human Resources and Skills Development)*, 2016 PSLREB 11, and *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, were produced for the proposition articulated at paragraph 55 of *Mercer* that " … an adjudicator should reduce a disciplinary penalty only if it is clearly unreasonable or wrong."

[41] The employer argued that BSOs must be held to a higher standard than should members of the public because of the position of trust they occupy. Paragraph 842 of *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLREB 88, states as follows:

> *[842] I note that dishonesty during an investigation is a serious employment offence. The dishonesty in this case relates to a fundamental part of the employment relationship. The Agency has to place substantial trust in its border services officers to facilitate the flow of people and goods into Canada. Border services officers are left to work alone. Complaints can arise about their conduct, and the Agency expects a full and truthful account of its border services officers' enforcement actions. There is no room for dishonesty in investigative processes, and border services officers and similar officers are held to a higher standard because of the position of trust they occupy ….*

[42] The importance of progressive discipline is understood, argued the employer, but as is stated in *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121 at para. 85, "… the seriousness of the misconduct, the aggravating factors, and the previous disciplinary record may warrant different penalties in each situation. There is no requirement that discipline progress by preordained steps."

[43] There is ample precedent for a disciplinary measure consisting of a suspension for demeaning, demanding, and offensive behaviour in the workplace. *Szmukier v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 37, was such a case, and although the initial two-day suspension meted out in it was ultimately reduced to one day, a suspension was still the appropriate disciplinary measure in those circumstances. Since they are analogous to the present circumstances, the two-day suspension imposed upon the grievor should stand.

[44] Incidents that have the potential to negatively impact the CBSA's integrity must be taken seriously, as articulated in paragraph 60 of *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106. Paragraph 61, as follows, is particularly relevant to the employer's case:

> *[61] The grievor's argument that a lesser penalty would have accomplished the employer's goal ignores the fact that part of an employer's goal in imposing discipline is to send a message to the employee and to the workplace that objectionable behaviour is not acceptable. A violation of the Values and Ethics Code for the Public Service is a serious offence worthy of a serious penalty.*

[45] Given all the circumstances of the case, argued the employer, the two-day suspension should stand.

B. For the grievor

[46] The grievor submitted the two-day suspension was excessive. An oral reprimand was within the range of disciplinary measures available, and given the weight of the mitigating factors, should be the appropriate disciplinary measure.

[47] The disciplinary letter did not mention the most important mitigating factor of all, namely, the grievor's spur-of-the-moment response to a frustrating situation, which was provoked or at least exacerbated by the traveler's actions. On its own, this factor justifies a disciplinary measure lesser than a suspension.

[48] In addition, submitted counsel for the grievor, inappropriate weight was given to an aggravating factor that did not even exist. Mr. Hewson was not aware of the contents of Mr. Singer's email to the grievor, which spelled out quite clearly the nature of the allegations against him. The grievor did not have to open the attached electronic complaint form to know it had been alleged that he had said to Mr. Kapoor that he would "haul [his] ass back to the U.S." Therefore, the grievor argued, Mr. Hewson was mistaken in thinking that the grievor was being untruthful or less than forthcoming on June 10, 2014.

[49] The cases submitted by the employer in support of a suspension all describe much more serious behaviour than the grievor's.

[50] The *Stewart* case was about a BSO asking for free tickets to an Elton John concert after he had been specifically ordered not to.

[51] *Albert v. Canada Customs and Revenue Agency*, 2005 PSSRB 7, was a sexual-harassment case and was much more serious than the present matter.

[52] In *Mercer*, the BSO personally accessed his family members' Employment Insurance information and provided a service to them that was not available to other Canadians. The two-day suspension was probably the minimum that should have applied in such a case.

[53] In *Cooper*, a correctional officer was very loud and verbally abusive to her manager in the workplace, calling him names, screaming and shouting insults at him, and pushing him in an attempt to go through a door in front of him. In that case, a financial penalty of $160.00 was imposed rather than an oral or written reprimand.

The present circumstances can be clearly distinguished, argued the grievor, as it is clear that the verbal exchange with Mr. Kapoor was brief and was conducted in normal speaking voices. There was certainly no physical contact or aggressive behaviour.

[54] The *Szmukier* case involved a two-day suspension for harassing behaviour in the workplace that continued over a significant period. It would be disproportionate, argued the grievor, to equate such behaviour to the momentary lapse of good judgement displayed in the present matter.

[55] This case involves considering whether a disciplinary measure was excessive and whether a different measure should be substituted. The grievor made reference to a clear and definitive test which, although it dates back to 1976, has obviously stood the test of time. The case of *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, 1976 Carswell BC 518 ("*Scott*"), although it involved a discharge, states the principles applicable to grievances pertaining to excessive discipline. At paragraphs 11 and 12, in part:

> *11 Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?*
>
> *12 Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employers' authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline… However, usually it is in connection with the second question — is the misconduct of the employee serious enough to justify the heavy penalty of discharge? — that the arbitrator's evaluation of management's decision must be especially searching:*
>
> *(i) How serious is the immediate offence of the employee …*
>
> *(ii) Was the employee's conduct premeditated, or repetitive …*
>
> *(iii) Does the employee have a record of long service …*
>
> *(iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem … ? ….*

[56] The Scott principles were examined as follows in Ontario Secondary Schools Teachers' Federation, District 17 v. Simcoe (County) District School Board, 2011 CarswellOnt 14383 at para. 28:

> *28 In William Scott & Co., at para. 13, Prof. Paul Weiler, the then chair of the BCLRB, described a three-step test which, although differently worded, is in many respects similar to the test described in Bhadauria and set out above. Further, at paragraph 14, Prof. Weiler noted that an arbitrator's evaluation of whether the disciplinary response selected by the employer was appropriate must be "especially searching". There is no suggestion in this formulation, nor in the list of factors to consider which followed, that an arbitrator is limited to determining whether there was a reasonable basis for the decision of the employer.*

[57] Further, argued the grievor, a system of positive, progressive discipline is based on procedural and substantive fairness. *United Brotherhood of Carpenters and Joiners of America Local 1072 v. Ontario Store Fixtures Inc.*, 1993 CarsewellOnt 1256 at paras. 29 and 30, states as follows:

> *29 … There must be a sensible balance between the employer's legitimate interest in the efficient operation of his business, and the employee's equally legitimate interest in a continued livelihood with a degree of job security. The real question is: where to strike the balance?*
>
> …
>
> *30 In answering that question, most arbitrators take the view that an important purpose of discipline (short of discharge) is to ensure compliance with established norms of behaviour, and this typically requires "progressive" discipline, or a "corrective approach" to employee misbehaviour. This means that discipline is a tool to achieve an objective, not an end in itself. By increasing the severity of the discipline imposed for persistent misconduct, it is expected that an employee will be given an inducement to mend his ways; moreover, he will clearly be put on notice that if he does not do so, he will risk increasing sanctions, culminating eventually in his termination. If the employer follows progressive discipline, a worker may have real difficulty persuading an arbitrator that his ultimate discharge is unjust. Conversely, if an employer chooses a serious sanction for a "first offence", a worker may more easily claim that the penalty is disproportionate.*

[58] This is the issue in the present matter, argued the grievor. The employer chose a relatively serious disciplinary measure for a minor transgression. Two days' suspension was clearly disproportionate to the gravity of the misconduct at issue.

[59] I was urged to exercise my discretion and substitute an oral or written reprimand for the suspension. For the following reasons, I will do so.

IV. Reasons

[60] I disagree with the approach suggested by the *Mercer* and *Cooper* cases, and I completely agree with the approach in *Scott*. This is not an exercise in judicial review; I am not applying a standard of correctness or reasonableness. This is a hearing *de novo*, and my task is to assess what I shall refer to as the *Scott* criteria, as follows:

1. Was there a factual basis for imposing discipline?
2. If so, was the disciplinary measure imposed excessive?
3. If so, what should the appropriate measure consist of?

[61] The first question is the easiest to answer. I have no difficulty with the credibility of any of the witnesses. There were no conflicting versions of events. The grievor's memory was simply better than Mr. Kapoor's. In addition, the written narratives and statements were made so soon after the fact as to be reliable records of what actually happened. I find the grievor became frustrated with Mr. Kapoor's repeated answer of "I live in Canada" to questions pertaining to when he had moved back to this country. As a result of this frustration, the grievor uttered an unprofessional comment.

[62] The grievor lost his patience and said words to the effect, "I will haul your ass back to the U.S." The grievor admitted as much on the witness stand. I find that the first step of the *Scott* test is simply and easily decided on the balance of probabilities — this was disrespectful language with a member of the public, which clearly contravenes section 10 of the CBSA's *Code of Conduct*. Discipline was warranted.

[63] The second stage of the *Scott* test is slightly more complicated, because although this is a hearing *de novo*, this stage involves an analysis and evaluation of the disciplinary measure previously imposed, to determine whether or not it was excessive.

[64] Although Mr. Hewson is ultimately accountable for the content of the disciplinary letter dated October 14, 2014, I appreciate that he was not the author of it. I also appreciate that by necessity, documents of this nature must follow some form of

template. The letter has some serious shortcomings which underlie my finding the two-day suspension an overly-harsh sanction.

[65] A notice of disciplinary action must clearly spell out the precise nature of the transgression. The disciplinary letter refers to an "incident", an "interaction", and to "unprofessional" actions and "inappropriate" comments towards a traveler. But there is nothing concrete about those comments or actions.

[66] "I will haul your ass back to the U.S." is a comment the grievor admitted to making, but he also said words to the effect, "Do you think I am an idiot?"

[67] Mr. Borg, a fellow BSO, did not feel it was inappropriate for the grievor to say the latter phrase to a traveler who, for some unknown reason, was seemingly being purposely obtuse or deceptive.

[68] Mr. Borg testified to using words to that effect to other travelers, under similar circumstances in the past. I can appreciate this: the job of a BSO is not easy, and in many situations, a blunt approach is probably needed. As long as it is not accompanied by rude or profane language or a raised voice, a blunt approach may be an appropriate mechanism for breaking through stubbornness or an otherwise defiant or belligerent attitude.

[69] Was the grievor also being disciplined for saying, "Do you think I am an idiot?" I certainly hope not. I do not feel discipline would be warranted for saying those words under the circumstances set out by the evidence. Unfortunately, the letter is silent on this issue. The unprofessional comments forming the basis for disciplinary action are not spelled out.

[70] There is an unfortunate tendency, in professional discipline cases involving rude, colourful, or profane language, for decision makers to dance daintily around the actual words that were used. This is not helpful. The recipient of the disciplinary action must be brought face-to-face with the precise nature of his or her transgression. That is the only way of assessing whether the accompanying sanction was fair, just, suitable, or reasonable. In the present case, the letter is unclear about what the grievor is being sanctioned for.

[71] Throughout the hearing, given the vague language of the disciplinary letter, I wondered whether there might also have been some residual ill feelings on the part of

CBSA management for having to contact Mr. Kapoor and reimburse the $724.89 he paid in taxes and duties following his encounter with the grievor. Was there a lingering allegation of neglect of duty or deficient performance of his duty as well? Were these the "unprofessional actions" referred to in the letter? Probably not, but again, given the vagueness of the letter, one is obliged to read between the lines and, in a word, guess.

[72] The determinations of the fact-finding process must be clearly spelled out to provide clear notice of the nature of the misconduct at issue.

[73] Equally vague is the articulation of the aggravating and mitigating factors. The range of sanction open to Mr. Hewson was quite wide, from an oral reprimand to five days' suspension. Where he ultimately lands along this spectrum depends entirely upon the weight given to aggravating and mitigating factors, so this is a very important part of the analysis. It is also crucial to the second stage of the *Scott* analysis, because the aggravating and mitigating factors taken into account will determine whether or not the discipline imposed was excessive or not.

[74] The letter states, "… I have considered all relevant facts and all aggravating and mitigating factors …". All disciplinary letters say this, probably because someone told the writers that they have to say it. More important, and more helpful, would be to actually spell out the aggravating and mitigating factors and to explain the weight each factor carries.

[75] Dishonesty is not mentioned in the letter as an aggravating factor, despite Mr. Hewson's testimony that he felt it was an aggravating factor.

[76] Without saying so in as many words, the letter seems to indicate that the aggravating factors are "the nature of the comments" and "… that Border Services Officers are expected to be professional at all times when dealing with the public."

[77] These are not aggravating factors. The nature of the comments and the standard of behaviour for BSOs are both important factors in determining whether an allegation of misconduct has been established in the first place. An aggravating factor, by definition, is external to the event, implying the penalty should be more severe.

[78] Mr. Hewson testified that the grievor's lack of honesty in the investigative process was an aggravating factor. If true, this would be a seriously aggravating factor. The degree of cooperation shown in the internal investigation is an external

consideration from whether the misconduct occurred, but it can go a long way towards determining the severity of the penalty that should apply to the misconduct at issue. Unfortunately, for reasons entirely beyond Mr. Hewson's control, he was wrong about the grievor's lack of honesty. The grievor was able to comment on the phrase, "I will haul your ass back to the U.S." without having to open the attachment to Mr. Singer's email, because Mr. Singer also included this phrase in the body of his email to the grievor. Mr. Hewson did not know this because he did not see Mr. Singer's email to the grievor.

[79] I do not find the grievor's comment in his initial narrative dated June 10, 2014, "I never said 'haul his ass to the U.S.'", to be indicative of a lack of honesty. When it came time to provide a formal statement to the investigator a few days later, the grievor admitted having used those words, or words to that effect. He admitted the comments were unprofessional, and said he regretted making them. The grievor's ready admissions to the administrative investigator are not an indication of dishonesty.

[80] One aggravating factor testified to by Mr. Hewson was the grievor's length of service: someone with the grievor's seniority should know better. The CBSA depends upon its senior BSOs to set an example for newer employees. In agreeing with this proposition, I find I must also agree with the grievor's observation that length of service can be a double-edged sword: a lengthy career with no prior record of discipline can also act as a mitigating factor.

[81] After analysis of all of the circumstances surrounding the imposition of discipline in the first instance, I find that inappropriate weight was accorded to aggravating factors that do not actually exist. This likely led to a disproportionately harsh disciplinary measure. But the second stage of my analysis of the *Scott* factors does not end here, because there are many mitigating factors to consider.

[82] The letter of October 14, 2014, mentions a few mitigating factors but neglects some very important ones. Quite properly, the letter refers to the absence of a prior disciplinary record, but it fails to mention that the grievor had gone a full 22 years without attracting any disciplinary attention of any kind, which is a significant distinction.

[83] The letter also properly refers to the grievor's acceptance of responsibility, with which I entirely agree. It also refers to his genuine expression of remorse, with which I also agree. The grievor testified at many junctures in his time on the witness stand about how sorry he was for saying disrespectful words to Mr. Kapoor.

[84] The grievor also said that his words were a product of his increasing level of frustration with Mr. Kapoor. Based on the evidence, I find that Mr. Kapoor played an important role in escalating the situation. The grievor's utterance was spontaneous and the product of an uncharacteristic and very temporary lack of good judgement. These are mitigating factors that should have been taken into account but were not.

[85] Another mitigating factor that was not taken into account was the grievor's approach to improving the quality of life in his workplace. Some of his workplace efforts go above and beyond the call of duty. He mentors junior BSOs. He helps organize team-building golf tournaments. Of significance is his diligence in obtaining and developing an outdoor shooting range for the use of off-duty BSOs who wish to practise for their firearms qualification, the successful completion of which is a condition of employment. The grievor located a suitable site for the shooting range and negotiated its use with the landowner. He continues to collect a nominal fee from range users, which he submits to the landowner. He prepares the range for shooting events and cleans up shell casings afterward, and he even supplies some of his own lumber to construct target stands. His efforts over the course of his career to improve the workplace are important mitigating factors.

[86] Therefore, I find that insufficient weight was applied to mitigating factors. Combined with the weight accorded to non-existent aggravating factors, this leads me to conclude that the two-day suspension imposed as a disciplinary measure was excessive, as per the second component of the *Scott* criteria.

[87] The third and final avenue of inquiry under the *Scott* criteria invites consideration of the appropriate disciplinary measure that should be substituted for the two-day suspension that was imposed. Since I have considered all of the aggravating and mitigating factors in the second stage, I will not repeat them here.

[88] A written reprimand is appropriate, given all the circumstances. The grievor is well aware of the precise nature of his misconduct. Under the circumstances, the language used was relatively mild, despite being inappropriate. They were the result of

a temporary lapse in what can only be described as a career-long history of displaying good judgement.

[89] In a system of positive and progressive discipline, it is appropriate to sanction first offenders lightly for relatively minor instances of misconduct. These events fall squarely into that category.

[90] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[91] The grievance is allowed.

[92] A written reprimand is to be substituted for the two-day suspension, and any record of the previously-imposed disciplinary measure is to be removed from the grievor's file.

[93] I order the Deputy Head, Canada Border Services Agency, to reimburse the grievor two days' pay, with no loss of benefits, subject to the usual deductions.

July 12, 2019.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board